

§ 201.16

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be printed in type size no smaller than that used predominantly throughout the form, and in no case shall the type size be smaller than 8 points. The notice shall be printed in such manner as to be clearly legible, comprehensible, and readily apparent to a casual reader of the form.

(Pub. L. 94–553; 17 U.S.C. 108, 702)

[42 FR 59265, Nov. 16, 1977]

§ 201.16 Verification of a Statement of Account for secondary transmissions made by cable systems and satellite carriers.

(a) *General.* This section prescribes procedures pertaining to the verification of a Statement of Account filed with the Copyright Office pursuant to sections 111(d)(1) or 119(b)(1) of title 17 of the United States Code.

(b) *Definitions.* As used in this section:

(1) The term *cable system* has the meaning set forth in § 201.17(b)(2).

(2) *Copyright owner* means any person or entity that owns the copyright in a work embodied in a secondary transmission made by a statutory licensee that filed a Statement of Account with the Copyright Office for an accounting period beginning on or after January 1, 2010, or a designated agent or representative of such person or entity.

(3) *Multiple system operator* or *MSO* means an entity that owns, controls, or operates more than one cable system.

(4) *Net aggregate underpayment* means the aggregate amount of underpayments found by the auditor less the aggregate amount of any overpayments found by the auditor, as measured against the total amount of royalties reflected on the Statements of Account examined by the auditor.

(5) *Participating copyright owner* means a copyright owner that filed a notice of intent to audit a Statement of Account pursuant to paragraph (c)(1) or (2) of this section and any other copyright owner that has given notice of its intent to participate in such audit pursuant to paragraph (c)(3) of this section.

(6) The term *satellite carrier* has the meaning set forth in 17 U.S.C. 119(d)(6).

(7) The term *secondary transmission* has the meaning set forth in 17 U.S.C. 111(f)(2).

(8) *Statement of Account* or *Statement* means a semiannual Statement of Account filed with the Copyright Office under 17 U.S.C. 111(d)(1) or 119(b)(1) or an amended Statement of Account filed with the Office pursuant to §§ 201.11(h) or 201.17(m).

(9) *Statutory licensee* or *licensee* means a cable system or satellite carrier that filed a Statement of Account with the Office under 17 U.S.C. 111(d)(1) or 119(b)(1).

(c) *Notice of intent to audit.* (1) Any copyright owner that intends to audit a Statement of Account for an accounting period beginning on or after January 1, 2010 must provide written notice to the Register of Copyrights no later than three years after the last day of the year in which the Statement was filed with the Office. The notice must be received in the Office on or after December 1st and no later than December 31st, and a copy of the notice must be provided to the statutory licensee on the same day that it is filed with the Office. Between January 1st and January 31st of the next calendar year the Office will publish a notice in the FEDERAL REGISTER announcing the receipt of the notice of intent to audit. A notice of intent to audit may be filed by an individual copyright owner or a designated agent that represents a group or multiple groups of copyright owners. The notice shall include a statement indicating that it is a “notice of intent to audit” and it shall contain the following information:

(i) It shall identify the licensee that filed the Statement(s) with the Office, and the Statement(s) and accounting period(s) that will be subject to the audit.

(ii) It shall identify the party that filed the notice, including its name, address, telephone number, and email address, and it shall include a statement that the party owns or represents one or more copyright owners that own a work that was embodied in a secondary transmission made by the statutory licensee during one or more of the accounting period(s) specified in the Statement(s) that will be subject to the audit.

(2) Notwithstanding the schedule set forth in paragraph (c)(1) of this section, any copyright owner that intends to

audit a Statement of Account pursuant to an expanded audit under paragraph (n) of this section may provide written notice of such to the Register of Copyrights during any month, but no later than three years after the last day of the year in which the Statement was filed with the Office. A copy of the notice must be provided to the licensee on the same day that the notice is filed with the Office. Within thirty days after the notice has been received, the Office will publish a notice in the FEDERAL REGISTER announcing the receipt of the notice of intent to conduct an expanded audit. A notice given pursuant to this paragraph may be provided by an individual copyright owner or a designated agent that represents a group or multiple groups of copyright owners. The notice shall include a statement indicating that it is a “notice of intent to conduct an expanded audit” and it shall contain the information specified in paragraphs (c)(1)(i) and (ii) of this section.

(3) Within thirty days after a notice is published in the FEDERAL REGISTER pursuant to paragraphs (c)(1) or (2) of this section, any other copyright owner that owns a work that was embodied in a secondary transmission made by that statutory licensee during an accounting period covered by the Statement(s) of Account referenced in the FEDERAL REGISTER notice and that wishes to participate in the audit of such Statement(s) must provide written notice of such participation to the Copyright Office as well as to the licensee and party that filed the notice of intent to audit. A notice given pursuant to this paragraph may be provided by an individual copyright owner or a designated agent that represents a group or multiple groups of copyright owners, and shall include the information specified in paragraphs (c)(1)(i) and (ii) of this section.

(4) Notices submitted to the Office under paragraphs (c)(1) through (3) of this section should be addressed to the “U.S. Copyright Office, Office of the General Counsel” and should be sent to the address for time-sensitive requests set forth in § 201.1(c)(1).

(5) Once the Office has received a notice of intent to audit a Statement of Account under paragraphs (c)(1) or (2)

of this section, a notice of intent to audit that same Statement will not be accepted for publication in the FEDERAL REGISTER.

(6) Once the Office has received a notice of intent to audit two Statements of Account filed by a particular satellite carrier or a particular cable system, a notice of intent to audit that same carrier or that same system under paragraph (c)(1) of this section will not be accepted for publication in the FEDERAL REGISTER until the following calendar year.

(7) If the Office has received a notice of intent to audit prior to the effective date of this section, the Office will publish a notice in the FEDERAL REGISTER within thirty days thereafter announcing the receipt of the notice of intent to audit. In such a case, the audit shall be conducted using the procedures set forth in paragraphs (d) through (l) of this section, with the following exceptions:

(i) The participating copyright owners shall provide the statutory licensee with a list of three independent and qualified auditors pursuant to paragraph (d)(1) by March 16, 2015.

(ii) The auditor shall deliver his or her final report to the participating copyright owners and the licensee pursuant to paragraph (i)(3) of this section by November 1, 2015.

(d) *Selection of the auditor.* (1) Within forty-five days after a notice is published in the FEDERAL REGISTER pursuant to paragraph (c)(1) of this section, the participating copyright owners shall provide the statutory licensee with a list of three independent and qualified auditors, along with information reasonably sufficient for the licensee to evaluate the proposed auditors’ independence and qualifications, including:

(i) The auditor’s *curriculum vitae* and a list of audits that the auditor has conducted pursuant to 17 U.S.C. 111(d)(6) or 119(b)(2);

(ii) A list and, subject to any confidentiality or other legal restrictions, a brief description of any other work the auditor has performed for any of the participating copyright owners during the prior two calendar years;

(iii) A list identifying the participating copyright owners for whom the

auditor's firm has been engaged during the prior two calendar years; and,

(iv) A copy of the engagement letter that would govern the auditor's performance of the audit and that provides for the auditor to be compensated on a non-contingent flat fee or hourly basis that does not take into account the results of the audit.

(2) Within five business days after receiving the list of auditors from the participating copyright owners, the licensee shall select one of the proposed auditors and shall notify the participating copyright owners of its selection. That auditor shall be retained by the participating copyright owners and shall conduct the audit on behalf of all copyright owners who own a work that was embodied in a secondary transmission made by the licensee during the accounting period(s) specified in the Statement(s) of Account identified in the notice of intent to audit.

(3) The auditor shall be independent and qualified as defined in this section. An auditor shall be considered independent and qualified if:

(i) He or she is a certified public accountant and a member in good standing with the American Institute of Certified Public Accountants ("AICPA") and the licensing authority for the jurisdiction(s) where the auditor is licensed to practice;

(ii) He or she is not, for any purpose other than the audit, an officer, employee, or agent of any participating copyright owner;

(iii) He or she is independent as that term is used in the Code of Professional Conduct of the AICPA, including the Principles, Rules, and Interpretations of such Code; and

(iv) He or she is independent as that term is used in the Statements on Auditing Standards promulgated by the Auditing Standards Board of the AICPA and Interpretations thereof issued by the Auditing Standards Division of the AICPA.

(e) *Commencement of the audit.* (1) Within ten days after the selection of the auditor, the auditor shall meet by telephone or in person with designated representatives of the participating copyright owners and the statutory licensee to review the scope of the audit, audit methodology, applicable auditing

standard, and schedule for conducting and completing the audit.

(2) Within thirty days after the selection of the auditor, the licensee shall provide the auditor and a representative of the participating copyright owners with a list of all broadcast signals retransmitted pursuant to the statutory license in each community covered by each of the Statements of Account subject to the audit, including the call sign for each broadcast signal and each multicast signal. In the case of an audit involving a cable system or MSO, the list must include the classification of each signal on a community-by-community basis pursuant to § 201.17(e)(9)(iv) through (v) and 201.17(h). The list shall be signed by a duly authorized agent of the licensee and the signature shall be accompanied by the following statement "I, the undersigned agent of the statutory licensee, hereby declare under penalty of law that all statements of fact contained herein are true, complete, and correct to the best of my knowledge, information, and belief, and are made in good faith."

(f) *Failure to proceed with a noticed audit.* If the participating copyright owners fail to provide the statutory licensee with a list of auditors or fail to retain the auditor selected by the licensee pursuant to paragraph (d)(2) of this section, the Statement(s) of Account identified in the notice of intent to audit shall not be subject to audit under this section.

(g) *Ex parte communications.* Following the initial consultation pursuant to paragraph (e)(1) of this section and until the distribution of the auditor's final report to the participating copyright owners pursuant to paragraph (i)(3) of this section, there shall be no *ex parte* communications regarding the audit between the auditor and the participating copyright owners or their representatives; provided, however, that the auditor may engage in such *ex parte* communications where either:

(1) Subject to paragraph (i)(4) of this section, the auditor has a reasonable basis to suspect fraud and that participation by the licensee in communications regarding the suspected fraud would, in the reasonable opinion of the

auditor, prejudice the investigation of such suspected fraud; or

(2) The auditor provides the licensee with a reasonable opportunity to participate in communications with the participating copyright owners or their representatives and the licensee declines to do so.

(h) *Auditor's authority and access.* (1) The auditor shall have exclusive authority to verify all of the information reported on the Statement(s) of Account subject to the audit in order to confirm the correctness of the calculations and royalty payments reported therein; provided, however, that the auditor shall not determine whether any cable system properly classified any broadcast signal as required by § 201.17(e)(9)(iv) through (v) and 201.17(h) or whether a satellite carrier properly determined that any subscriber or group of subscribers is eligible to receive any broadcast signals under 17 U.S.C. 119(a).

(2) The statutory licensee shall provide the auditor with reasonable access to the licensee's books and records and any other information that the auditor needs in order to conduct the audit. The licensee shall provide the auditor with any information the auditor reasonably requests promptly after receiving such a request.

(3) The audit shall be conducted during regular business hours at a location designated by the licensee with consideration given to minimizing the costs and burdens associated with the audit. If the auditor and the licensee agree, the audit may be conducted in whole or in part by means of electronic communication.

(4) With the exception of its obligations under paragraphs (d) and (e) of this section, a licensee may suspend its participation in an audit for no more than sixty days before the semi-annual due dates for filing Statements of Account by providing advance written notice to the auditor and a representative of the participating copyright owners, provided however, that if the participating copyright owners notify the licensee within ten days of receiving such notice of their good-faith belief that the suspension could prevent the auditor from delivering his or her final report to the participating copyright

owners before the statute of limitations may expire on any claims under the Copyright Act related to a Statement of Account covered by that audit, the licensee may not suspend its participation in the audit unless it first executes a tolling agreement to extend the statute of limitations by a period of time equal to the period of the suspension.

(i) *Audit report.* (1) After reviewing the books, records, and any other information received from the statutory licensee, the auditor shall prepare a draft written report setting forth his or her initial conclusions and shall deliver a copy of that draft report to the licensee. The auditor shall then consult with a representative of the licensee regarding the conclusions set forth in the draft report for up to thirty days. If, upon consulting with the licensee, the auditor concludes that there are errors in the facts or conclusions set forth in the draft report, the auditor shall correct those errors.

(2) Within thirty days after the date that the auditor delivered the draft report to the licensee pursuant to paragraph (i)(1) of this section, the auditor shall prepare a final version of the written report setting forth his or her ultimate conclusions and shall deliver a copy of that final version to the licensee. Within fourteen days thereafter, the licensee may provide the auditor with a written rebuttal setting forth its good faith objections to the facts or conclusions set forth in the final version of the report.

(3) Subject to the confidentiality provisions set forth in paragraph (1) of this section, the auditor shall attach a copy of any written rebuttal timely received from the licensee to the final version of the report and shall deliver a copy of the complete final report to the participating copyright owners and the licensee. The final report must be delivered by November 1st of the year in which the notice was published in the FEDERAL REGISTER pursuant to paragraph (c)(1) of this section and within five business days after the last day on which the licensee may provide the auditor with a written rebuttal pursuant to paragraph (i)(2) of this section. Upon delivery of the complete and final

report, the auditor shall notify the Office that the audit has been completed. The notice to the Office shall specify the date that the auditor delivered the final report to the parties; whether, with respect to each statement examined, the auditor has discovered any underpayment or overpayment; and whether the auditor has received a written rebuttal from the licensee. The notice should be addressed to the “U.S. Copyright Office, Office of the General Counsel” and should be sent to the address for time-sensitive requests specified in § 201.1(c)(1).

(4) Prior to the delivery of the final report pursuant to paragraph (i)(3) of this section the auditor shall not provide any draft of his or her report to the participating copyright owners or their representatives; provided, however, that the auditor may deliver a draft report simultaneously to the licensee and the participating copyright owners if the auditor has a reasonable basis to suspect fraud.

(j) *Corrections, supplemental payments, and refunds.* (1) If the auditor concludes in his or her final report that any of the information reported on a Statement of Account is incorrect or incomplete, that the calculation of the royalty fee payable for a particular accounting period was incorrect, or that the amount deposited in the Office for that period was too low, a statutory licensee may cure such incorrect or incomplete information or underpayment by filing an amendment to the Statement and, in case of a deficiency in payment, by depositing supplemental royalty fee payments with the Office using the procedures set forth in §§ 201.11(h) or 201.17(m); provided, however, that the amendment and/or payments are received within sixty days after the delivery of the final report to the participating copyright owners and the licensee or in the case of an audit of an MSO, within ninety days after the delivery of such report; and further provided that the licensee has reimbursed the participating copyright owners for the licensee’s share of the audit costs, if any, determined to be owing pursuant to paragraph (k)(3) of this section. While reimbursement of audit costs shall be paid to a representative of the participating copyright

owners, supplemental royalty fee payments made pursuant to this paragraph shall be delivered to the Office and not to the participating copyright owners or their representatives.

(2) Notwithstanding §§ 201.11(h)(3)(i) and 201.17(m)(4)(i), if the auditor concludes in his or her final report that there was an overpayment on a particular Statement, the licensee may request a refund from the Office using the procedures set forth in §§ 201.11(h)(3) or 201.17(m)(4), provided that the request is received within sixty days after the delivery of the final report to the participating copyright owners and the licensee or within ninety days after the delivery of the final report in the case of an audit of an MSO.

(k) *Costs of the audit.* (1) No later than the fifteenth day of each month during the course of the audit, the auditor shall provide the participating copyright owners with an itemized statement of the costs incurred by the auditor during the previous month, and shall provide a copy to the licensee that is the subject of the audit.

(2) If the auditor concludes in his or her final report that there was no net aggregate underpayment or a net aggregate underpayment of five percent or less, the participating copyright owners shall pay for the full costs of the auditor. If the auditor concludes in his or her final report that there was a net aggregate underpayment of more than five percent but less than ten percent, the costs of the auditor are to be split evenly between the participating copyright owners and the licensee that is the subject of the audit. If the auditor concludes in his or her final report that there was a net aggregate underpayment of ten percent or more, the licensee will be responsible for the full costs of the auditor.

(3) If a licensee is responsible for any portion of the costs of the auditor, a representative of the participating copyright owners shall provide the licensee with an itemized accounting of the auditor’s total costs, the appropriate share of which should be paid by the licensee to such representative no later than sixty days after the delivery of the final report to the participating

copyright owners and licensee or within ninety days after the delivery of such report in the case of an audit of an MSO.

(4) Notwithstanding anything to the contrary in paragraph (k) of this section, no portion of the auditor's costs that exceed the amount of the net aggregate underpayment may be recovered from the licensee.

(1) *Confidentiality.* (1) For purposes of this section, confidential information shall include any non-public financial or business information pertaining to a Statement of Account that is the subject of an audit under 17 U.S.C. 111(d)(6) or 119(b)(2).

(2) Access to confidential information under this section shall be limited to:

(i) The auditor; and

(ii) Subject to the execution of a reasonable confidentiality agreement, outside counsel for the participating copyright owners and any third party consultants retained by outside counsel, and any employees, agents, consultants, or independent contractors of the auditor who are not employees, officers, or agents of a participating copyright owner for any purpose other than the audit, who are engaged in the audit of a Statement or activities directly related hereto, and who require access to the confidential information for the purpose of performing such duties during the ordinary course of their employment.

(3) The auditor and any person identified in paragraph (1)(2)(ii) of this section shall implement procedures to safeguard all confidential information received from any third party in connection with an audit, using a reasonable standard of care, but no less than the same degree of security used to protect confidential financial and business information or similarly sensitive information belonging to the auditor or such person.

(m) *Frequency and scope of the audit.*

(1) Except as provided in paragraph (n)(2) of this section with respect to expanded audits, a cable system, MSO, or satellite carrier shall be subject to no more than one audit per calendar year.

(2) Except as provided in paragraph (n)(1) of this section, the audit of a particular cable system or satellite carrier

shall include no more than two of the Statements of Account filed by that cable system or satellite carrier that may be timely noticed for audit under paragraph (c)(1) of this section.

(3) Except as provided in paragraph (n)(3)(ii) of this section, an audit of an MSO shall be limited to a sample of no more than ten percent of the MSO's Form 3 cable systems and no more than ten percent of the MSO's Form 2 systems.

(n) *Expanded audits.* (1) If the auditor concludes in his or her final report that there was a net aggregate underpayment of five percent or more on the Statements of Account examined in an initial audit involving a cable system or satellite carrier, a copyright owner may expand the audit to include all previous Statements filed by that cable system or satellite carrier that may be timely noticed for audit under paragraph (c)(2) of this section. The expanded audit shall be conducted using the procedures set forth in paragraphs (d) through (l) of this section, with the following exceptions:

(i) The expanded audit may be conducted by the same auditor that performed the initial audit, provided that the participating copyright owners provide the licensee with updated information reasonably sufficient to allow the licensee to determine that there has been no material change in the auditor's independence and qualifications. In the alternative, the expanded audit may be conducted by an auditor selected by the licensee using the procedure set forth in paragraph (d) of this section.

(ii) The auditor shall deliver his or her final report to the participating copyright owners and the licensee within five business days following the last day on which the licensee may provide the auditor with a written rebuttal pursuant to paragraph (i)(2) of this section, but shall not be required to deliver the report by November 1st of the year in which the notice was published in the FEDERAL REGISTER pursuant to paragraph (c) of this section.

(2) An expanded audit of a cable system or a satellite carrier that is conducted pursuant to paragraph (n)(1) of

this section may be conducted concurrently with another audit involving that same licensee.

(3) If the auditor concludes in his or her final report that there was a net aggregate underpayment of five percent or more on the Statements of Account examined in an initial audit involving an MSO:

(i) The cable systems included in the initial audit of that MSO shall be subject to an expanded audit in accordance with paragraph (n)(1) of this section; and

(ii) The MSO shall be subject to a new initial audit involving a sample of no more than thirty percent of its Form 3 cable systems and no more than thirty percent of its Form 2 cable systems, provided that the notice of intent to conduct that audit is filed in the same calendar year as the delivery of such final report.

(o) *Retention of records.* For each Statement of Account or amended Statement that a statutory licensee files with the Office for accounting periods beginning on or after January 1, 2010, the licensee shall maintain all records necessary to confirm the correctness of the calculations and royalty payments reported in each Statement or amended Statement for at least three and one-half years after the last day of the year in which that Statement or amended Statement was filed with the Office and, in the event that such Statement or amended Statement is the subject of an audit conducted pursuant to this section, shall continue to maintain those records until three years after the auditor delivers the final report to the participating copyright owners and the licensee pursuant to paragraph (i)(3) of this section.

[79 FR 68628, Nov. 18, 2014]

§ 201.17 Statements of Account covering compulsory licenses for secondary transmissions by cable systems.

(a) *General.* This section prescribes rules pertaining to the deposit of Statements of Account and royalty fees in the Copyright Office as required by section 111(d)(2) of title 17 of the United States Code in order for sec-

ondary transmissions of cable systems to be subject to compulsory licensing.

(b) *Definitions.* (1) Gross receipts for the “basic service of providing secondary transmissions of primary broadcast transmitters” include the full amount of monthly (or other periodic) service fees for any and all services or tiers of services which include one or more secondary transmissions of television or radio broadcast signals, for additional set fees, and for converter fees. In no case shall gross receipts be less than the cost of obtaining the signals of primary broadcast transmitters for subsequent retransmission. All such gross receipts shall be aggregated and the distant signal equivalent (DSE) calculations shall be made against the aggregated amount. Gross receipts for secondary transmission services do not include installation (including connection, relocation, disconnection, or reconnection) fees, separate charges for security, alarm or facsimile services, charges for late payments, or charges for pay cable or other program origination services: *Provided That*, the origination services are not offered in combination with secondary transmission service for a single fee.

(2) A *cable system* is a facility, located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service. A system that meets this definition is considered a “cable system” for copyright purposes, even if the FCC excludes it from being considered a “cable system” because of the number or nature of its subscribers or the nature of its secondary transmissions. The Statements of Account and royalty fees to be deposited under § 201.17 of this section, shall be recorded and deposited by each individual cable system desiring its secondary transmissions to be subject to compulsory licensing. The owner of each individual